REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 343 of 2011

EVANS THIGA GATURU, ADVOCATE...ADVOCATE/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK LIMITED…....CLIENT/RESPONDENT

R U L I N G

This ruling is in respect of two applications. The first application is the Notice of Motion dated 15th December 2011 filed on 16th December 2011 by Evans Thiga Gaturu Advocate (hereinafter referred to as "the advocate") seeking orders that judgement be entered for the applicant against the respondent in the sum of Kshs. 714,906.86 plus interest at 14% per annum from 24th March 2010 till payment in full. The applicant also seeks costs of the said application.

The second application is the Chamber Summons dated 18th January 2012 filed by Macharia-Mwangi & Njeru Advocates on behalf of the respondent (hereinafter referred to as "the client") seeking primarily orders that the taxing officer's decision made on 6th July 2011 be set aside and that the bill of costs dated 24th March 2011 be taxed afresh before a different taxing officer. Needlessly to say it also seeks that the costs of the application be provided for.

By consent of the parties it was agreed that both applications be heard and a ruling in respect thereof be delivered together since the hearing of one may dispose of the other. In other words, if the respondent's application seeking to set aside the taxation is allowed, the application by the advocate would be rendered superfluous.

It is therefore important to consider the application by the client before venturing into the issue whether a consideration of the application by the advocate is necessary.

This reference brings into focus the perennial problems devilling the procedure for the taxation of costs between an advocate and client in this country. Paragraph 13 of the Advocates (Remuneration Order) provides as follows:

(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a

client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bills of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.

What the above provision provides is that the bill of costs to be taxed is to be filed in a miscellaneous cause. A "cause" in this context, in my considered view, means a "proceeding" which has been interpreted to include both actions and matters and "matters" means every proceeding which may be commenced as prescribed otherwise than by plaint. See ***Uganda Commercial Bank Vs. Akamba (U) Limited Kampala HCCS No. 592 of 1992.***

The wording of paragraph 13 aforesaid has been a source of contradicting judicial pronouncement in this country whose position remains unsettled to date. Whereas the said paragraph provides that a bill is to be taxed ***upon an application***, it however, states that ***without any order for the purpose*****.** Some decisions have interpreted this to mean that no leave is required for an advocate to tax his bill. However, other courts have held that such leave is required. In my considered view, it would be sensible, to apply and obtain leave. It is at that stage that the issue of retainer ship would be disposed of so that after the taxation of the costs, judgement would thereby entered on the issuance of the certificate of costs without having to determine whether or not there is a retainer. It would save judicial time by having the issue of the retainer determined early in the taxation proceedings instead of running the risk of having to go through the elaborate process of taxation only for the process to come to nought on the ground of lack of a retainer at the end. However, as current state of the law seems to have no quarrel with taxation without leave, I wish to say no more on the issue.

After the taxation of the bill of costs, the procedure for the challenge of the results there from is provided under Paragraph 11 of the said Order which provides:

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

From the foregoing it is clear that the reasons for the decision are to be sought for by way of a notice within 14 days of the decision and the reference is to be lodged within 14 days of the receipt of the reasons.

That brings us to the question of what happens, as the client alleges in this case, where no reasons are given. First, and foremost, the above provisions presuppose that in delivering their decisions on taxation, the taxing officers only pronounce the results of the taxation without the reasons behind them. In most cases, the court is aware that, taxing officers, in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons, thereafter. In such circumstances it would be foolhardy to expect the taxing officer to redraft another "ruling" containing the reasons. In my view, this is another provision that requires to be looked into afresh. I do not see the reason why the taxing officer cannot be at the time of making his decision to do so together with the reasons therefor. The result of these vague provisions is that certain courts have held that preferring a reference before the reasons are furnished renders the reference incompetent. In **Muriu Mungai & Co. Advocates vs. New Kenya Co-Operative Creameries Ltd Nairobi (Milimani) Hcmc No. 692 of 2007,**

Mwilu, J was of the view that:

"It is mandatory for an applicant who objects to a taxation to annex the ruling, giving reasons by the taxing master supporting the taxation...Nowhere is it provided that if there be a delay in the taxing master giving reasons for taxation then a party may file a reference. Instead, rule 11 (4) gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken...Under the rules the taxing officer is required forthwith, upon receipt of the notice of objection to give reasons for the decision and where they fail to do so, the thing to do is not to file a reference to the High Court...In the court's view, the applicant moved the court too soon. More reminders should have been sent to the taxing officer for reasons or any other legal action that would have resulted in the taxing officer giving reasons to be taken to have the reasons given. Nobody else can give those reasons but the taxing officer and it has not been shown that the taxing officer is not available. And more importantly the court cannot determine the matter in the absence of the taxing officer's reasons for her decision in taxing the bill of costs as she did".

Mwilu, J's view is supported by Mohammed Ibrahim, J, (as he then was) in **Paul Gicheru T/A Gicheru & Co. Advocates vs. Kargua (K) Construction Co. Ltd Eldoret HCMCA No. 124 of 2007**, where the learned judge was of the view that:

"Under rule 11(2) of the Advocates Remuneration Order, the taxing officer was required to record and forward to the objector the reasons for his/her decision on items 1 and 2. This is a mandatory requirement as the word used is "shall". It is only after receipt of these reasons that an objector may within another fourteen (14) days of receipt of the reasons that he can file the application raising his objections before a judge...While the taxing master did not give specific reasons even by reiteration and referred to the entire body of his ruling, he complied with the requirement at least by way of procedure, if nothing else. In such a case, if the ruling is detailed and answers the inquiry, it is arguable that it would be superfluous for the taxing master to give any other reasons or repeat himself...But it is not correct to say that if the ruling of the taxing master is actually a ruling then there is no need to request for such reasons. If this was correct interpretation, then there would be no need for the Rules Committee to set out an elaborate and long procedure as set out in the Rules. --+--+All an aggrieved person would have required to do is to give notice of objection within 14 days of the decision being made and thereafter file the application/reference within another 14 days. The words in Rule 11(2) are certain and clear that the taxing master must give the reasons for the decision within 14 days of the Notice of Objection being filed. He could thereafter do either of the following:

a. if he is satisfied that the Ruling is so elaborate, detailed and sufficient to express clearly all the reasons for the decision on each item, then he could state that the reasons are in the ruling; or

b. he could summarise specific reasons for decision on each item; or

c. if the ruling/decision given earlier is not detailed enough to enable the objector lodge an effective and proper reference, then the taxing master would be obliged to give reasons for the decisions on each of the items complained.

It would appear that the requirement for the reasons to be given was to ensure that an objector fully knows the basis for the decision. Such a requirement appears reasonable since it is quite common and usual that the rulings or assessment of taxation are brief, precise and to the point. It is only where there is serious contentions and arguments that the taxing master would go into in-depth reasoning. In any event, the Court must apply the law as it is, as there is no room for any other interpretation or need to use any other method of interpretation than the "Golden Rule" to meet the ends of justice...In the instant case, after the notice, the taxing master was required to record and forward the reasons for the decision on items 1 and 2. No time is given for this and it is presumed that it must be done within a reasonable time. However, no sooner, the notice was filed than the applicant the next day filed the reference. This did not give any time to the taxing master to discharge her duty under Rule 11(2). The applicant acted prematurely and pre-empted the

giving of the reasons by the Deputy Registrar as taxing officer/master...There are no reasons on record after the Notice of Objection. The application/reference herein is null and void *ab initio*. It is a nullity. This omission is incurable as the requirement for recording and forwarding of reasons is a mandatory one and the effect of this is that this Court truly in the circumstances has no jurisdiction to entertain the application and jurisdiction being everything, without it a Court has no power to make one more step".

The Court of Appeal however, took a different view in **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528**where the Court held:

"On reference to a Judge from a taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs...An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles or where the taxing officer has over emphasized the difficulties, importance and complexity of the suit...If the taxing officer fails to apply the formula for assessing instructions fees or costs specified in schedule VI (1), that would be an error in principle...If a Judge on a reference finds that the taxing officer has omitted an error of principle the general practice is to remit the question of quantum for the decision of taxing officer... The judge has however a discretion to deal with the matter himself if the justice of the case so requires...*If a taxing officer totally fails to record any reasons and to forward them to the objector, as required then that would be a good ground for a reference and the absence of such reasons would not in itself preclude the objector from filing a competent reference".*

In **Nyamogo & Nyamogo vs. Kenya Bus Services Nairobi Milimani HCMA No. 587 of 2004,** Ochieng', J stated that:

"pursuant to the provisions of rule 11(1) of the advocates (remuneration) order, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects and upon receipt of the notice, rule 11(2) obligates the taxing officer to forthwith record and forward to the objector the reasons for his decision...by promising to give his reasons for taxation in due course the taxing officer must be deemed to have been aware that the reasons were not in the ruling and by subsequently declining to provide the reasons the taxing officer must be deemed to have failed to discharge the obligation bestowed upon him by rule 11(2) of the Advocates (Remuneration) Order...Where the sum awarded is four times the minimum sum prescribed, the taxing officer would have been expected in his reasons for taxation to justify his finding that such an award was appropriate...Such reasons are essential when the Judge is giving consideration to a reference, as it enables the Court determine whether or not the taxing officer may have taken into account irrelevant consideration; or if he had failed to take into account relevant factors, or if the taxing officer had erred in principle".

In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 1 EA 5** Ochieng, J, similarly, held as follows:

"Although rule 11(1) of the Advocates Remuneration Order stipulates that any party who wishes to object to the decision of the taxing officer, should do so within 14 days after the said decision and thereafter file his reference within 14 days from the date of the receipt of the reasons, where the reasons for the taxation on the disputed items in the bill are already contained in the considered ruling, there is no need to seek for further reasons simply because of the unfortunate wording of subrule (2) of rule 11 of the Advocates Remuneration Order demands so. The said rule was not intended to be ritualistically observed even when reasons for the disputed taxation are already contained in the formal and considered ruling...Therefore the reference having been filed way out of the period prescribed should have been dismissed but having been given due consideration in substance, the same dismissed".

It is therefore clear that the interpretations by the Court especially the High Court on this issue is far and

varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of **Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005,** where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.

In the present case, the ruling on taxation was made on 6th July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in **Kipkorir, Titoo & Kiara Advocates (ibid),** is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished.

I, accordingly, find that as the client filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted. I accordingly strike out the Chamber Summons dated 18th January, 2012 but make no order as to costs since the problem has been partly caused by inaction on the part of the court.

I now proceed to determine the Notice of Motion dated 15th December 2011. Section 51(2) of the Advocates Act provides as follows:

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs”.

The client filed grounds of opposition in which it states that the orders sought in this cause can only be considered in a separate suit filed to recover fees and that the same cannot be granted without evidence of retainer. The other issues raised are no longer material in light of the finding already made on the reference.

In my view, where an advocates costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. That issue, as already stated, would be appropriately dealt with if the leave was sought. However, there is no bar to the same being raised before the taxing master in which case the taxation may be adjourned pending the determination of the issue before a Judge. In this case, the decision of the taxing master seems to have been arrived at without the benefit of the submissions of the client, which according to the taxing officer, were not on the file. I have, however, perused the submissions which were allegedly filed a copy of which is annexed to the supporting affidavit. Nowhere is the issue of the retainer raised. The only issue raised is that the advocate herein left with the file from the firm of Muthoga, Gaturu & Co. Advocates, hence not entitled to full fees since instructions fees had been paid to the firm. It is not alleged that he had no instructions to carry on with the suit. In the premises, this suit is distinguishable from the authorities relied upon by the client in the submissions. I accordingly find that the certificate of costs herein is final as to the amount covered therein and accordingly enter judgement in respect thereof.

With respect to interest paragraph 7 of the Remuneration Order provides that an advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full. In paragraph 10 of the supporting affidavit the advocate deposes that he served the client with the Bill of Costs on 24th March 2011 which averment has not been disputed by way of an affidavit.

Accordingly, I award interest on the said judgement at the rate of 14% with effect from 24th April 2011 till payment in full. I also award costs of the motion to the advocate save for instructions fees which are not payable pursuant to the provisions of Paragraph 13 (3) of the Remuneration Order.

Ruling read, signed and delivered in Court this 22nd day of March 2012

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Gaturu for the Advocate

Mr. Masinde for the Client